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No. 712

In the Supreme Court of the United States

OCTOBER TERM, 1963

SIDNEY O. SAMPSON, PETITIONER

v.

CHARLES A. CHURCH, District Director of Internal Revenue, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

LOUIS F. OBERDORFER,
Assistant Attorney General,

JOSEPH KOVNER,
CEOMBIE J. D. GARRETT,
Attorneys,
Department of Justice,
Washington, D. C. 20530

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In his income tax returns for 1959 and 1960, petitioner, a waiter, reported as income certain amounts received by him as tips. The Commissioner found that petitioner had received in tips amounts greater than those reported and determined deficiencies accordingly, mailing the statutory notices to petitioner on March 14, 1963. Without having paid the de-

ficiencies or filed claims for refund for taxes previously paid, petitioner, on April 1, 1963,[1] brought this action against the District Director seeking a declaration that tips, not being specifically enumerated in the definition of gross income (§ 61, Internal Revenue Code of 1954), are not includible in income and that the statute, if interpreted as authorizing the inclusion of tips despite the failure to enumerate them, is unconstitutional as a delegation of legislative power. The district court dismissed the action for lack of jurisdiction (Pet. 23a-25a), and the court of appeals dismissed petitioner's appeal as frivolous (Pet. 26a-28a). Shortly after bringing this action, on April 16, 1963, petitioner also filed a petition for redetermination of the deficiencies in the Tax Court (see Pet. 4). The Tax Court proceedings (Docket No. 1958-63) are still pending.

The decision below is correct. As a suit for refund, petitioner's action is barred by his failure to file claims for refund (§ 7422, 1954 Code), by his failure to pay the deficiencies (*Flora* v. *United States*, 362 U.S. 145), and by his subsequent filing of a petition in the Tax Court (§§ 6512(a) and 7422(e), 1954 Code). As a suit for an injunction or a declaratory judgment, it is expressly barred by statute. (§ 7421(a), 1954 Code; 28 U.S.C. 2201). Petitioner's arguments on the merits, both as to the reach of § 61 in general[2]

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[1] A second complaint was filed on April 22, 1963.

[2] See *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426.

and as to the taxability of tips in particular, are equally without substance. The petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH KOVNER,
CROMBIE J. D. GARRETT,
Attorneys.

JANUARY 1964.

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[1] See *Andrews* v. *United States*, 295 F.2d 819 (Ct. Cl.), certiorari denied, 369 U.S. 829; *Roberts* v. *Commissioner*, 176 F.2d 221 (C.A. 9); *Commissioner* v. *Duberstein*, 363 U.S. 278, 285 n. 7; Treas. Regs. (1954 Code), § 1.61-2.

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